

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1042

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

FERNANDO PADRON, RUBEN LOPEZ,
and WALTER SINTSCHA,

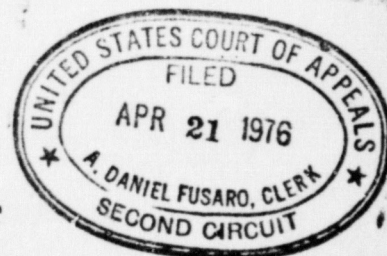
Defendants-Appellants.

Docket No. 76-1042

JOINT APPENDIX TO APPELLANTS' BRIEFS

ON APPEAL FROM JUDGMENTS
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
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509 United States Court House
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(212) 349-6750

DARNELL J. BLACKETT, ESQ.,
Attorney for Appellant
WALTER SINTSCHA
401 Broadway
New York, New York 10013
(212) 925-3552

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

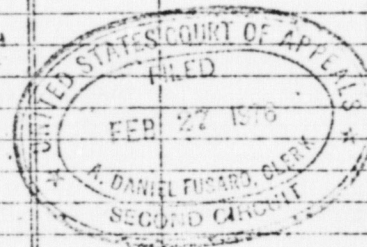
JUDGE POLLACK

75 CRIM. 938

D. C. Form No. 100 Rev.

TITLE OF CASE		ATTORNEY
THE UNITED STATES		For U. S.:
vs.		Thomas E. Engel, AUSA.
1. EDWARD MONTIEL, a/k/a Carlos-1,4. <i>cc file</i>		791-1929
2. RUBEN LOPEZ-1,4,5.		
3. WALTER SINTSCHA-1-5,7.		
4. ARMANDO DELBARRIO-1,4,6.		
5. PAULA DELBARRIO-1,6.		
6. FERNANDO PADRON-1,4. <i>cc 4-11-75</i>		
Lewis R. Friedman Mark Lemle Amsterdam 120 Broadway 12 Bedford Street N.Y.C. 10005 New York, N.Y. 10014 349-6750 for R. Lopez tele: (212) 675-6569 for Edward Montiel		For Defendant: Jeffrey Weingart 401 Eway, N.Y.C. 10013 tele: 226-6829 for defts. Armando & Paula DelBarrio.

(07) STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk				
J.S. 3 mailed 1/4, 3, 4, 5, 6	Marshal				
Violation	Docket fee				
Title 21					
<p>S.S. 846, 847, 848(a)(1), (b), Consp. to viol. Fed. Narcos. Laws. (Cts. 1) Distr. & possess. w/intent to distr. Cocaine, II. (Cts. 2-7)</p> <p>(Seven Counts)</p>					



DATE	PROCEEDINGS
9-29-75	Filed indictment.
9-30-75	Deft. EDWARD MONTIEL present (Atty. not present). Case adjourned to 10-1-75. Duffy, J.
10-1-75	Pleading adjourned to 10-6-75. Deft. continued remanded in lieu of bail. (\$25,000.) Duffy, J.
10-6-75	Ruben Lopez: Deft. present (no Atty.) Court directs a plea of not guilty be entered. Bail \$10,000 P.R.B. secured by \$1,000 cash cont'd. Walter Sintscha present (no Atty.) Court directs a plea of not guilty be entered. Bail \$15,000 P.R.B. secured by \$750. continued. Armando Delbarrio present (Atty. present) pleads not guilty. Bail \$10,000 P.R.B. secured by \$1000 cash continued. Paula Delbarrio present (Atty. present) pleads not guilty. Bail \$5,000 P.R.B. continued. Fernando Padron present (Att. present) pleads not guilty. Bail at \$5,000 P.R.B. continued. Edward Montiel present (no Atty.) Court directs a plea of not guilty be entered. Bail \$25,000 cont'd. Deft. remanded cont'd in lieu of

2. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Ord Judgment
12-4-75	Filed Deft. Padron's requested jury instructions.	
12-4-75	Filed deft. Ruben Lopez's requests to charge.	
-08-75	Filed memo-end. on motion docketed 12-2-75. Motions of deft. Lopez are denied. Suppression hearing has been held. Pollack, J. m/n	
-08-75	Filed memo-end. on motion docketed 11-25-75. Motion of deft. Monticelli is granted to the extent of dismissing count 4 against him by consent and the motion is otherwise denied. Pollack, J. m/n.	
12-8-75	Filed memo-end. on motion docketed 11-25-75. Motion of deft. Monticelli for a severance is denied. Pollack, J. m/n/	
12-8-75	Filed memoend. on motion docketed 11-21-75. Motion of deft. Padron to dismiss the 4th count is denied without prejudice to renewal at trial. Pollack, J. m/n	
12-9-75	Filed memo-end. (2nd) on motion of 11-21-75. Fourth Count as to deft. Padron is dismissed at close of the trial for improper venue. Pollack, J. m/n	
12-11-75	Filed Deft. W. Sintscha's request to charge.	
12-11-75	Filed deft. Padron's requested jury instructions.	
-05-75	Defts. E. Monticelli, R. Lopez, W. Sintscha and F. Padron (all attys. present) before Judge Pollack - jury trial begun.	
12-08-75	Trial cont'd.	
12-08-75	Trial cont'd. All motions of all defts. are denied except the motion of deft. F. Padron to dismiss count 4 for improper venue which is granted. Pollack, J.	
12-10-75	Trial cont'd. and concluded. Jury verdict deft. E. Monticelli found not guilty- deft. discharged, this indictment only. Deft. R. Lopez found guilty on each of counts 1 and 5. Not guilty on count 3. Deft. W. Sintscha found guilty on each of counts 1, 2, 3, 4, 5 and 7. Deft. Padron found guilty on count 1. Defts. R. Lopez and W. Sintscha-motions will be made in writing to the Court. Deft. F. Padron's motion to set aside the verdict and for a judgment of acquittal is denied. Pre-sentence report ordered. For sentence 1-21-76 at 10 AM. room 905. If any deft. has a passport it is to be surrendered forthwith. Deft. W. Sintscha remanded in lieu of increased bail pending appeal fixed at \$25,000. Deft. R. Lopez remanded in lieu of increased bail pending appeal fixed at \$10,000. Deft. F. Padron's remanded in lieu of increased bail pending appeal fixed at \$5,000. P.R.B. to be secured by \$2,000 cash or surety. Pollack, J.	
-12-75	F. Padron-filed Appearance Bond in the sum of \$5000.	

DATE	PROCEEDINGS	Date Of Judgment
12-12-75	Filed ORDER that deft. Fernando Padron be released pending sentence on 1-21-75, upon his execution of a personal appearance bond in the amount of \$5,000, co-signed by his father, F. Padron secured by a deposit of \$500. cash in the Registry of the Court. Pollack, J. (see entry of 12-12-75)	
12-17-75	Filed deft. W. Sintscha's notice of motion re: order setting aside the guilty verdict.	
12-17-75	Filed memo-end. on motion docketed this date, deft. Sintscha's motion to set aside verdict and to acquit deft. is denied. Pollack, J. m/n	
12-17-75	Filed deft. R. Lopez's notice of motion re: judgment of acquittal, new trial, ntiary hearing.	
12-19-75	Filed memo-end. on motion docketed 12-17-75. Motion of Ruben Lopez. The 3500 materials were all turned over to the deft., in advance of the testimony of the witness Bradley. The notations whosever they were of the location within Bradley's own 3500 materials of aspects thereof do not constitute further 3500 material and the deft.'s counsel raises a sham argument. There is no merit in any aspect of this motion and it is denied. in all respects. Pollack, J. m/n	
12-19-75	Filed remand dated 12-12-75 (for deft. F. Padron).	
12-19-75	Filed discharge dated 12-10-75. (for deft. E. Monticelli)	
1-8-76	Filed transcript of record of proceedings, dated Jan 19, 1976.	
1-21-76	Armando DelBarrio-Filed Judgment (atty. present) deft. is committed to the custody of the Atty. Gen'l. for imprisonment on each of counts 4 and 6 to run conc. as a YOUNG ADULT OFFENDER for treatment and supervision pursuant to Section 5010(b), T. 18, U.S.C. until discharged by the Fed. Youth Corr. Division of the Board of Parole as provided in T. 18 U.S. U.S. Code Sec. 5017(c). Pursuant to the provisions of T. 21, U.S.C. Section 841, the deft. is placed on Special Parole for a period of 3 yrs. to commence upon expiration of confinement. Count 1 is dismissed on motion of deft.'s counsel with the consent of the Govt. Deft. is cont'd. on present bail until 1-23-76 at 10AM, at which time he is to surrender to the U.S. Marshal in room 506 for service of sentence. Pollack, J. issued all copies.	
1-28-76	Filed deft. F. Padron's notice of appeal from judgment of 1-23-76. Mailed copies to U.S. Atty. and deft.	
1-28-76	RUBEN LOPEZ (atty. present) 2 yrs. impr. on each of cts. 1 and 5 to run conc. with each other. Pursuant to the provisions of T. 21, Section 841, U.S. Code, the deft. is placed on Special Parole for a term of 3 yrs. to commence upon expiration of confinement. Deft. is to be given credit for time already served. Deft. advised of right to appeal. Pollack, J. issued all copies.	

DATE	PROCEEDINGS
1-28-76	<p>FERNANDO PADRON(atty. present) Filed Judgment-deft. is sentenced as a YOUNG ADULT OFFENDER on count 1 for treatment and supervision pursuant to 18 U.S.C.A., Section 5010(b) but execution of all except 6 mons. of this sentence is suspended and the deft. is placed on probation for 3 years pursuant to 18 U.S.C.A. Section 5010(a), the period of probation to commence upon release of deft. from the custody of the Atty. Gen'l., etc. and to be subject to the standing probation order of this Court. Pursuant to the provisions of T. 21, U.S. Code, Section 841 the deft. is placed on Special Parole for a period of 3 yrs. to commence upon expiration of confinement. Special Parole is to run CONCURRENTLY with the term of probation. Execution of sentence is stayed pending appeal. Deft. cont'd. on present bail pending appeal. Pollack, J. issued all copies.</p>
1-28-76	<p>Deft. Paula DelBarrio-Govt.'s motion to dismiss is granted. Pollack, J.</p>
1-30-76	<p>Walter Sintscha(atty. present) Filed Judgment-5 yrs. impr. on ea. of cts. 1, 2, 3, 4, 5 and 7 to run conc. w/ea. other. Pursuant to provisions of T. 21, Sec. 841, U.S. Code, the deft. is placed on Special Parole for a period of 3 yrs. to commence upon expiration of confinement. Deft. advised of his right to appeal. Pollack, J. issued all copies.</p>
2-06-76	<p>Filed deft. Ruben Lopez's notice of appeal from judgment of 1-28-76. Mailed copies to U.S. Atty & deft.</p>
2-08-76	<p>Filed deft. Walter Sintscha's notice of appeal from judgment of 1-30-76 Mailed copies to U.S. Atty & deft.</p>

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

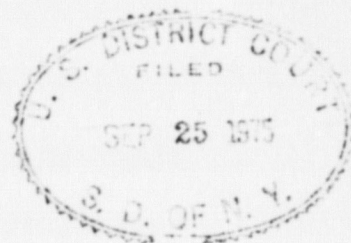
1- EDWARD MONTIELL, a/k/a "Carlos",
2- RUBEN LOPEZ, a/k/a "John",
3- WALTER SINTSCHA,
4- ARMANDO DELBARRIO, a/k/a "A1",
5- PAULA DELBARRIO, and
6- FERNANDO PADRON,

Defendants.

75 CRIM. 938

INDICTMENT

75 Cr.



COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of July, 1975, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, EDWARD MONTIELL, a/k/a "Carlos", RUBEN LOPEZ, a/k/a "John", WALTER SINTSCHA, ARMANDO DELBARRIO, a/k/a "A1", PAULA DELBARRIO, and FERNANDO PADRON, the defendants, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

(1) On or about July 10, 1975, defendant WALTER SINTSCHA delivered approximately 6.5 grams (net weight) of cocaine in the vicinity of 66 West 84th Street, New York, New York.

(2) On or about July 23, 1975, defendant RUBEN LOPEZ, a/k/a "John", gave the defendant WALTER SINTSCHA approximately 28.0 grams of cocaine.

(3) On or about July 25, 1975 defendant FERNANDO PADRON made a phone call from a phone booth at a Mobil gas station in the vicinity of 165th Street and Hillside Avenue, Queens, New York.

(4) On or about July 25, 1975 defendant FERNANDO PADRON walked to a red Datsun parked in the vicinity of 165th Street and Hillside Avenue, Queens, New York.

(5) On or about July 25, 1975, defendant EDWARD MONTIELL, a/k/a "Carlos", delivered 98.5 grams of cocaine to defendant ARMANDO DELBARRIO, a/k/a "Al", in the vicinity of 162-15 Highland Avenue, Queens, New York.

(6) On or about July 25, 1975, defendant ARMANDO DELBARRIO, a/k/a "Al", received \$5,000 for 98.5 grams of cocaine in the vicinity of 162-1' Highland Avenue, Queens, New York.

(7) On or about August 6, 1975 defendants WALTER SINTSCHA and RUBEN LOPEZ, a/k/a "John" discussed the sale of two ounces of cocaine in O'Neal Bros. Bar, New York, New York.

(8) On or about August 7, 1975, the defendant RUBEN LOPEZ, a/k/a "John", handed two ounces of cocaine to defendant WALTER SINTSCHA in Apartment 5-A, 66 West 84th Street, New York, New York.

(9) On or about August 7, 1975, defendant WALTER SINTSCHA counted and handed \$3,000 to defendant RUBEN LOPEZ, a/k/a "John".

(10) On or about August 14, 1975 defendant ARMANDO DELBARRIO, a/k/a "Al", discussed the sale of one pound of cocaine with an undercover police officer of the New York City Police Department.

(11) On or about August 14, 1975 defendant PAULA DELBARRIO cleared the dining room table in Apartment 7-0, 162-15 Highland Avenue, Queens, New York.

(12) On or about August 14, 1975 defendant ARMANDO DELBARRIO placed a plastic bag of cocaine on a dish and gave a sample of the cocaine to an undercover police officer of the New York City Police Department.

COUNT TWO

The Grand Jury further charges:

On or about the 10th day of July, 1975, in the Southern District of New York, WALTER SINTSCHA, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 6.5 grams of cocaine.

(Title 21, United States Code, Sections 812
841(a)(1) and 841 (b)(1)(A).)

COUNT THREE

The Grand Jury further charges:

On or about the 23rd day of July, 1975, in the Southern District of New York, RUBEN LOPEZ, a/k/a "John", and WALTER SINTSCHA, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 28.0 grams of cocaine.

(Title 21, United States Code, Sections 812 841(a)(1) and 341(b)(1)(A).)

COUNT FOUR

The Grand Jury further charges:

On or about the 25th day of July, 1975, in the Southern District of New York, EDWARD MONTIEL, a/k/a "Carlos", FERNANDO PADRON, ARMANDO DELBARRIO, a/k/a "Al" and WALTER SINTSCHA, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 98.5 grams of cocaine.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT FIVE

The Grand Jury further charges:

On or about the 7th day of August, 1975 in the Southern District of New York, RUBEN LOPEZ, a/k/a "John", and WALTER SINTSCHA, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately two ounces of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

TE:ko

COUNT SIX

The Grand Jury further charges:

On or about the 14th day of August, 1975, in the Eastern District of New York, ARMANDO DELBARRIO, a/k/a "Al", and PAULA DELBARRIO, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 0.1 gram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT SEVEN

The Grand Jury further charges:

On or about the 10th day of September, 1975, in the Southern District of New York, WALTER SINTSCHA, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one-quarter of an ounce of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

Albert C. Anttila
FOREMAN

Paul J. Curran
PAUL J. CURRAN
United States Attorney

United States District Court
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

EDWARD MONTIEL, a/k/a "Carlos",
RUBEN LOPEZ, a/k/a "John",
WALTER SINTSCHA,
ARMANDO DELBARRIO, a/k/a "Al",
PAULA DELBARRIO, and
FERNANDO PADRON,

Defendants.

INDICTMENT

(21, USC, §§ 812, 841(a)(1),
841(b)(1)(A) and 846)

PAUL J. CURRAN

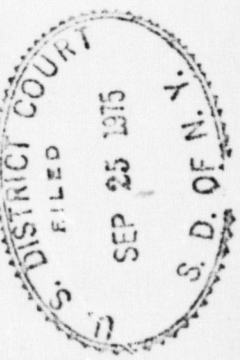
United States Attorney

A TRUE BILL

Albert C. Anstett

Foreman

FPI-89-113-70-2011-4023



Sept. 22, 1975. 11:30 AM. PRESENT. DOTTY, J.
Sept. 30, 1975. 10:00 AM. PRESENT. DOTTY, J.
CASE ADJUDICATED TO OCTOBER 1, 1975. MK

October 1, 1975. Pleading adjourned to Oct. 3.
to 10/6/75. Mkt. continued. Unrecorded in
book of bail (\$25,000). Ruben Lopez, Mkt.

October 6, 1975. Mkt. present. (no lawyer)
Court directs M/G plea be entered. Bail
\$10,000 ORB sec. by \$1000. cash continued.

Mkt. Walter Antocha present. (no lawyer)
Court directs a M/G plea be entered.
Bail \$15,000. ORB sec. by \$750. continued.

Mkt. Armando Delbarrio (atty. Jeffrey Wengard)
pleads M/G. Bail: \$10,000 ORB sec. by
\$1000. cash, continued.

Mkt. Paula Delbarrio - (atty. Jeffrey Wengard)
pleads M/G, Bail: \$5000. ORB continued.
(over)

10/6/75 - Deft. Fernando Padron (Atty. Daniel)
pleads N/G - Bail \$5000. RB Steinbock.
Continued.

Deft. Edward Montiel (Atty. Murray Cutler)
Court directs a N/G plea be entered. (not present)
Bail \$25,000
Continued. Deft. Remarcel (Continued) in lieu of
bail fixed by Magistrate.

Future case assigned Pollock J for all
purposes.

NOV 19 1975 D.C.B. 9/17/50 Cannella J
Armando Pellarino (Atty. Jeffrey Fairgair present)
pleads guilty as to each of counts 4 and 6 only
Count one carried until date of sentence. The sentence
of report ordered. For sentence Jan. 9, 1976 at 9:45.
Room 905. Bail could. Pollock J.
(B. Fassione, Rpt.)

(R. Sassone, Rpt.)

NOV 19 1975

Paula B. Harris (Atty Jeffrey Kingford present)

Def's application to be severed from the
trial of the co-defendants is granted
with the consent of the Court. Pollack, J.

DEC 3 - 1975

Edward Montell (Atty Mark Amsterdam present) -

Def's application to Dismiss Count 4 as to deft
E. Montell is granted. Pollack, J.

DEC 3 - 1975

Def'ts E. Montell, R. Lopez, W. Sinterland
& T. Padron present in Court with their Attorney.

Trial set for Dec. 5, 1975 at 10 A.M. Pollack, J.
(R. Sassone, Rpt.)

DEC 5 - 1975

Def'ts E. Montell, R. Lopez, W. Sinterland and
T. Padron (All def's present) - Before Pollack, J.
- Jury trial begun.

DEC 8 - 1975 Trial Contd.

DEC 9 - 1975 Trial Contd. Court Rpts. All motions of all depts. are denied except the motion of deft. F. Padron to dismiss Count 4 for improper venue which is granted.

DEC 10 1975 Trial Contd. and CONCLUDED. --JURY DICT (5 P.M.) DEFT. F. MONTIEL FOUND NOT GUILTY. --DEFT. R. LOPEZ FOUND GUILTY on each of counts 1 and 5. NOT GUILTY on count 3. --DEFT. W. SINTSCHA FOUND GUILTY on each of counts 1, 2, 3, 4, 5, and 7. DEFT. F. PADRON FOUND GUILTY on count 1. --JURY POLLED. JURY EXCUSED. DEFTS. R. LOPEZ and W. SINTSCHA --Motions will be made in writing to the Court. DEFT. F. PADRON's motion to set aside the verdict and for a judgment of acquittal is Denied. --Pre-sentence reports ordered. --For sentence JAN. 21, 1976 at 10 A.M., Room 905. If any deft. has a passport it is to be surrendered forthwith. -- DEFT. W. SINTSCHA remanded in lieu of increased bail pending appeal fixed at \$25,000. DEFT. R. LOPEZ remanded in lieu of increased bail pending appeal fixed at \$10,000. DEFT. F. PADRON remanded in lieu of increased bail pending appeal fixed at \$5,000. PRB to be secured by \$2,000. cash or surety. POLLACK, J. (R. DeSimone, Rptr.)

JAN 21 1976 DEFT. ARMANDO DELBARRIO (atty Jeffrey Weingard present) --SENTENCED on each of counts 4 and 6 to run concurrently w as a YOUNG ADULT OFFENDER for treatment and supervision pursuant to Section 5010(b), Title 18, U.S.C., until discharged by the Federal Youth Correction Division of the Board of Parole as provided in Title 18, U.S.C., Section 5017(c). --Pursuant to the provisions of Title 21, U.S.C., Section 841, the deft. is placed on Special Parole for a period of THREE(3) YEARS to commence upon expiration of confinement. Count 1 is dismissed on motion of deft's counsel with consent of the Govt. --Deft. is continued on present bail until Jan. 28, 1976 at 10 A.M., at which time he is to surrender to the U.S. Marshal in Room 506 for service of sentence. POLLACK, J. (J. Flannery, AUSA) (D. Welfant, Rptr.)

JAN. 28, 1976 RUBEN LOPEZ (atty Lewis Freedman present) SENTENCED. TWO YEARS on each of counts 1 and 5 to run CONCURRENTLY with each other. Pursuant to the provisions of T. 21, Section 841, U.S. Code, the deft. is placed on Special Parole for a term of THREE(3) YEARS to commence upon expiration of confinement. Deft. to be given credit for such time as has been served. Deft. advised of this right to Appeal. Deft. REMANDED. POLLACK, J.

DEFT. FERNANDO PADRON (atty Daniel Steinbock present) SENTENCED as a YOUNG ADULT OFFENDER on ct. 1. For treatment and supervision pursuant to 18 U.S.C.A., Section 5010(b) but execution of all except SIX MONTHS of this sentence is suspended and deft. is placed on Probation for THREE YEARS pursuant to 18 U.S.C., Section 5010(a), the period of probation to commence upon released of deft. from the custody of the Atty General or his authorized representative and to be subject to the standing probation order of this Court.

Pursuant to the provision of T. 21, U.S.C., Section 841, the deft. is placed on Special Parole for a period of THREE YEARS to commence upon expiration of confinement. The Special Parole is to run CONCURRENTLY with the term of probation. Execution of sentence is stayed pending Appeal. Deft. contd. on present bail pending Appeal. POLLACK, J.

DEFT. PAULA DELBARRIO --Govt's motion to dismiss as to deft. Paula Delbarrio is GRANTED. POLLACK, J.

JAN. 30, 1976 WALTER SINTSCHA (atty Darnell Blackett present) SENTENCED. FIVE(5) YEARS on each of counts 1, 2, 3, 4, 5, and 7 to run CONCURRENTLY with each other.

(E. Levine, Rptr.) Pursuant to the provisions of Title 21, U.S. Code, Section 841, the deft. is placed on Special Parole for a period of THREE(3) YEARS to commence upon expiration of confinement. Deft. advised of his right to appeal. (Hannigan, AUSA) Deft. REMANDED. POLLACK, J.

(Datchelder, AUSA)
(E. Levine, Rptr.)

1 rd/lf
2
3
4
5 THE CLERK: Court is about to charge the jury.

6 "Any spectators wishing to leave the courtroom will do so
7 "now or remain seated until the completion of the Court's
8 charge.

9 Marshal, please lock the door.

10 THE COURT: Members of the jury, we have reached
11 the concluding phase of this trial. I shall now give you
12 your final instructions on the law which will guide your
13 deliberations. I want to express to you the Court's apprecia-
14 tion and thanks for your attentiveness and patience during
15 the trial, as befits the triers of the facts in a case of
16 importance to the parties.

17 It is your recollection of the facts that counts
18 here and not the recollection of counsel and not my recollec-
19 tion. It is for you to determine the weight that will be
20 given to the evidence, the credibility that you will extend
21 to the witnesses who testified, and the reasonable inferences
22 that are to be drawn from the evidence that has been received.

23 You must approach your duty with an attitude of
24 complete fairness and impartiality, without the slightest
25 trace of sympathy, prejudice or bias, either for or against

the government or any of the defendants.

It is my province to instruct you as to legal principles that are to be followed in the case, and it is your duty to accept those instructions as they are given to you by me. On the other hand, it is your exclusive function to determine the facts on the basis of your consideration of the evidence and then applying the instructions as to the law that I am about to give you, to decide whether or not the defendant on trial before you is guilty of the charges against that defendant.

You are the sole and exclusive judges of the facts. Your decision as to the fact is final and conclusive. It is essential in the performance of your duty that as to anything ordered stricken from the record, you put it out of your mind and disregard it. Similarly, if a question was asked and an objection to that question was sustained and no answer was given, the question itself should play no part in your consideration of the case.

No inferences as to guilt or innocence of any defendant on trial or as to the credibility of any witness should be drawn from any rulings that I have made or from the fact that upon occasion I may have asked questions of certain witnesses. Any questions that were asked were intended only for clarification or to expedite matters. They

were not intended to suggest any opinions as to the guilt or innocence of any defendant or as to the credibility of anyone who appeared before you. It is neither my intention nor my function to favor one side or the other or to imply that I have any views as to the credibility of any of the witnesses or as to the guilt or innocence of any of the defendants. That is your sole and exclusive function.

In evaluating the evidence which has been placed before you you will determine the reliability of the witnesses you have heard and the extent to which you can count on any or all of them for accurate accounts of the facts. You have had an opportunity to observe the witnesses as they testified. You want to be asking yourselves and thinking together how each witness impressed you. Did the witness appear to be truthful, candid, frank and forthright, or did the witness seem evasive or shifty or suspect in any other way? Did the witness appear to know what he was talking about and did he impress you as having a purpose to report his knowledge to you carefully, conservatively, truthfully and accurately? Was he consistent or self-contradictory? How did the manner and matter of his direct testimony compare with his manner and matter of testimony tested on cross examination?

It frequently happens when numerous details of events have been called for, that a witness refers to

reports contemporaneously prepared to refresh recollection. This is not unusual, and the law allows one to be refreshed in his recollection. However, you will judge the need therefor in the light of your own experience and understanding of human behavior and memory.

You should consider not only the intrinsic persuasiveness of each person's testimony by itself but its setting in the circumstances of the whole case. For example, the degree to which any particular item of testimony is corroborated or contradicted by other evidence in the case and all such things you would test by your own mature judgment about life, about people, and about human behavior.

A witness may be discredited, or as we say impeached, by contradictory evidence or by evidence that at other times he made statements inconsistent with his testimony here on the witness stand. You should consider, among other things, the question of interest or motive. The witnesses have identified their backgrounds and associations. If you believe a witness has willfully sworn falsely before you, you are free to disregard all his testimony or to accept and credit and accept parts of it as your judgment dictates should be accepted.

There are, generally speaking, two types of evidence from which a jury may properly find the truth in the facts of

2 the case. One is direct evidence, such as the testimony of
3 an eyewitness or a participant. The other is indirect or
4 circumstantial evidence. The proof of a chain of circumstances
5 pointing to the existence or nonexistence of certain facts.
6 In order to prove a fact by circumstantial evidence there
7 must be positive proof of some fact which, though true,
8 does not itself directly establish the fact in dispute but
9 does afford basis for a reasonable inference of its existence.
10 The fact or facts upon which it is sought to base an inference
11 must be shown and not left to rest in conjecture, and when
12 shown it must appear that the inference drawn is the only
13 one that can fairly and reasonably be drawn from the facts
14 and that any other explanation is fairly and reasonably ex-
15 cluded.

16 Now, let me give you a common example of circum-
17 stantial evidence and what I have been just saying to you to
18 illustrate the point. Suppose at the time that you came into
19 court this morning the sun was shining and there were no
20 clouds in the sky and when you came into this trial courtroom
21 the blinds were drawn and the shades were down so that you
22 couldn't see outside. And pretty soon someone came through
23 that door, walking into the courtroom with a dripping umbrella
24 and a dripping raincoat. You haven't been outside in the
25 meantime. When you left outside it was clear, but when

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2 this person came in with his dripping umbrella and raincoat,
3 something may have happened outside. You would be entitled
4 to infer from the circumstance that there is a dripping
5 umbrella and a raincoat, that it is raining outside. Thus
6 circumstantially you infer from a fact, the dripping raincoat
7 and umbrella, some other matter, the rain outside. The
8 mind is led circumstantially from a fact to reach another
9 fact. That illustrates what circumstantial evidence is
10 and what it may lead to.

11 It is not necessary that the participation or
12 lack of participation of a defendant in any crime charged
13 be shown by direct evidence. The connection may be inferred
14 from such fact and circumstantial evidence, circumstances
15 as legitimately tend to sustain that inference.

16 In this case, of course, each side has produced,
17 either on direct or cross examination, both direct and
18 indirect or circumstantial evidence. Direct evidence
19 consists of having the cocaine having been presented to you.
20 You have oral testimony, subject to tests of recollection,
21 demeanor and credibility. You also have tape recordings of
22 phone conversations that do not suffer from recollection
23 in repeating for us the words exchanged.

24 The government contends that its direct evidence
25 and circumstantial evidence establishes each defendant's guilt.

2 Each defendant contends that no evidence has overcome the
3 presumption of his innocence and that at least there is a
4 reasonable doubt of his guilt. You will apply to all the
5 evidence the same standard of proof. It must satisfy you
6 of the guilt of the defendant beyond a reasonable doubt or
7 else you must acquit that defendant.

8 The indictment in this case contains six counts.
9 Each of these counts contains a separate offense or crime.
10 Each must be considered separately. The indictment named
11 six defendants, only four are on trial before you. These
12 are the only persons whose guilt or innocence you must
13 announce in your verdict, although as I will explain to you
14 shortly, in considering their alleged guilt or innocence
15 you may have to determine the nature of the participation,
16 if any, of the other named defendants.

17 In the determination of innocence or guilt, you
18 must bear in mind that guilt is personal. The guilt or
19 innocence of a defendant on trial before you must be determined
20 separately with respect to him, separately with respect to
21 each, and separately on each count, solely on the evidence
22 presented or the lack of evidence.

23 The indictment, as I think I explained to you
24 previously, is merely an accusation, a charge. It is not
25 evidence of proof of a defendant's guilt. The government

has the burden of proving the charges against the defendants beyond a reasonable doubt. It is a burden that never shifts and remains upon the government throughout the entire trial.

A defendant, under our law, does not have to prove his innocence. On the contrary, he is presumed to be innocent of the accusation contained in the indictment. His failure to testify cannot be considered by you as evidence against him or form a basis for any presumption or inference unfavorable to him. The presumption of innocence was in his favor at the start of the trial, continued in his favor throughout the trial, is in his favor even as I instruct you now. It is removed only if and when you have been satisfied that the government has sustained its burden of proving the guilt of the defendant beyond a reasonable doubt.

The question that naturally comes up is what is reasonable doubt. The words almost define themselves. That there is a doubt founded in reason and arising out of the evidence in the case or the lack of evidence. It is a doubt which a reasonable person has after carefully weighing all the evidence. It means a doubt that is not merely shadowy. A reasonable doubt is one which appeals to your reason, your judgment, your common sense and your experience. It is not caprice or whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not

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452

2 sympathy for a defendant.

3 If after a fair and impartial consideration of all
4 the evidence and the circumstances in the case you can candidly
5 and honestly say that you are not satisfied of the guilt of
6 the defendant, that you do not have an abiding conviction
7 of the defendant's guilt which amounts to a moral certainty,
8 then you have a reasonable doubt and in that circumstance it
9 is your duty to acquit.

10 On the other hand, if after such a fair and impartial
11 consideration of all the evidence you can candidly and
12 honestly say that you are satisfied of the guilt of the defen-
13 dant, that you do have an abiding conviction of the defendant's
14 guilt which amounts to a moral certainty, such a conviction
15 as you would be willing to act upon in important and weighty
16 matters in the personal affairs of your own life, then
17 you have no reasonable doubt. And in that circumstance it
18 is your duty to convict.

19 Putting it more plainly, if you are confronted with
20 an important decision, as you are here, and after reviewing
21 all of the facts that are pertinent, you are beset by doubt
22 and uncertainty and unsure of your judgment, then you have a
23 reasonable doubt. And conversely, taking into account all the
24 elements that pertain to the problem you have no uncertainty
25 and have no reservation about your judgment, then you have no

reasonable doubt.

One final word on this subject. Beyond a reasonable doubt does not mean to a positive certainty or beyond all possible doubt. If the rule required positive certainty or beyond all possible doubt, few men, however guilty they might be, would be convicted. Unless you are involved in a matter capable of mathematical certainty, it is practically impossible for a person to be absolutely and completely convinced of a controverted fact. Consequently, mathematical certainty is not required here.

The law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.

The indictment charges all of the defendants on trial before you with violations of the federal narcotics laws. The Comprehensive Drug Abuse Prevention Act of 1970 was passed by Congress because of concern with the illegal importation and distribution or possession of narcotics drugs with a view to distribution which have a substantial and detrimental effect on the health and welfare of our people. The part of this act which is applicable to the charges here is called the Controlled Substances Act, which became effective on May 1, 1971. It is not necessary for you to remember the conduct the act forbids and the essential

elements of the offenses here charged. The term "controlled substances" is used in the act to refer to any drugs, included in one of five schedules contained in the Controlled Substances Act. Cocaine is included in Schedule 2. Among other things, it is made unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute any controlled substances such as cocaine. In addition, any person who conspires to commit such offense commits a crime.

Another section of the law, Section 2 of Title 18 of the United States Code, provides in pertinent part, "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal," just as if he were the principal.

Let us turn to the specific charges against the defendants. The first count charges a conspiracy. It charges that all of the defendants, including the four on trial before you, together and with others to the grand jury unknown conspired to violate the federal narcotics laws. I shall refer to this count as the conspiracy count.

There is no sixth count for this jury to consider. The remaining counts, which are numbered 2nd through 7th, I shall refer to as the substantive counts. They charge actual

violations of the federal narcotics laws. That is what we refer to, as lawyers and judges, as the substantive law, and these are charges of substantive law violations, as contrasted with conspiracy which has to do with scheming. Substantive is carrying it out; conspiracy is scheming unlawfully.

Thus the following defendants on trial, Rubin Lopez and Walter Sintscha, are accused in one or more of the substantive counts of actually distributing various amounts of cocaine or possessing with intent to distribute. They are not charged with selling. They are charged with distributing or possessing with intent to distribute.

A conspiracy to commit a crime is entirely separate and distinct an offense from the substantive crime which is the objective of a conspiracy. The essence of the crime of conspiracy is an agreement or understanding to violate other laws. Thus if a conspiracy exists, even if it should fail of its purpose, it is still punishable as a crime. Consequently, in a conspiracy charge there is no need to prove an actual violation of the narcotics laws, an actual violation of the substantive law.

A conspiracy which sometimes is referred to as a partnership in crime is so referred to because it involves collective or organized action, presents a greater potential

threat to the public interest than the illicit activity of a single individual. Group association or organized activity renders detection more difficult than the instance of a single or lone wrong doer. It was for these reasons and other reasons that Congress made a conspiracy or concerted action to violate a general law a crime, entirely separate, distinct and different from the violation of the law or laws which may be the objective of the conspiracy.

Since the essential elements which the government must prove before a conviction may be had on any count are different in the instance of each crime, we shall consider each separately. I believe it will be somewhat clearer for you if we discuss the substantive narcotic counts; that is, those that have been labeled counts 2 through 7, excluding, as I said, 6. If we consider those first.

Counts 2, 3, 4 and 7 charged against Walter Sintscha, and counts 3 and 5 charged against Rubin Lopez, charge these defendants with the distribution or possession with the intent to distribute varying amounts of cocaine. Before you can find these defendants guilty of the crime charged in the substantive counts of this indictment, in which they are named, you must be convinced beyond a reasonable doubt that the government has proved the following elements.

First, that on or about the dates charged in the

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457

substantive counts before you the defendant named in those counts did distribute and possess with intent to distribute a narcotic drug controlled substance.

Second, that he did so unlawfully, willfully and knowingly.

Third, that the substance charged to have been distributed in each of those counts is, in fact, a narcotic drug controlled substance -- in this case cocaine.

I would like to say a few words on each of these elements. You will note that the first element of the offense is to distribute and possess with intent to distribute the drug. What does that phrase mean? I want to stress that it is sufficient, if you find beyond a reasonable doubt that the defendant named in the substantive count you are considering, either distributed or possessed with intent to distribute the narcotic drug. The word distribute means the actual constructive or attempted transfer of the drug. The word possess has its common everyday meaning; that is, to have something within your control, not necessarily in your pocket or in your hand. Possession may be of two types: actual or constructive. Actual possession means that a defendant knowingly has personal, manual or physical control of the drug. Constructive possession means that although the drugs are in the physical possession of another person, a

defendant knowingly has the power to exercise control over them or over their distribution or to direct their movement or to cause their delivery. In other words, to possess something you need not have it in your hand or in your pocket. As I have said, if it is within your power to exercise control over the drugs you have possession of them.

As to the second element, the terms unlawfully, willfully and knowingly means that you are to be satisfied beyond a reasonable doubt that the defendant knew what he was doing and that he acted deliberately and voluntarily and opposed to mistakenly or accidentally or as a result of some coercion. It is not necessary that he knew he was violating any particular law. It is sufficient, if you are convinced beyond a reasonable doubt that he was aware of the general unlawful nature of his acts.

As to the third element, the indictment charges that the narcotic drug controlled substance is cocaine. I instruct you as a matter of law that cocaine is a narcotic drug controlled substance. Just as with any other component of the crime the existence of and dealing with narcotics may be proved by circumstantial evidence. There need be no sample placed before the jury nor need there be testimony by chemists as long as the evidence, such as the stipulation in each case that was read to you concerning the content of

the exhibits, furnishes a basis for inferring that the material in question was narcotics -- in this case cocaine.

Finally, it is not necessary for the government to show as to the substantive count that a defendant physically committed the crime himself. The law provides that a person who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself. In the context of this case, accordingly, you may find the defendant Rubin Lopez guilty of the offense charged in count 3, if you find beyond a reasonable doubt that Walter Sintscha committed the offense with which he is charged within the count, and that Rubin Lopez aided and abetted Walter Sintscha.

If a defendant did know and act as a as a casual facilitator of a transaction, he cannot be found to be an aider and abettor. To determine whether Rubin Lopez aided and abetted the commission of the offense charged in count 3, you ask yourselves these questions: did he participate in it as something he wished to bring about? Did he associate himself with the venture? Did he seek by his action to make it succeed? If he did, then you may find that he is an aider and abettor and, therefore, guilty in that way.

Now, let us turn to count 1, the conspiracy charge. The indictment reads that "The grand jury charges from on or about the 1st day of July, 1975, and continuously there-

"after, up to and including the date of the filing of this indictment, which was September 25, 1975, in the Southern District of New York, Edward Montfeli, also known as Carlos, Rubin Lopez, also known as John, Walter Sintscha, Armando Delbarrio, also known as Al, Paula Delbarrio, and Fernando Padron, the defendants and others to the grand jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed with each other, together and with each other, to violate Sections 812, 841A1 and 841B1A of Title 21 of the United States Code.

"Two, it was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute or possess with intent to distribute Schedule 1 narcotic drug controlled substances, the exact amount thereof being to the grand jury unknown, in violation of Sections 812, 841A1, 841B1A of Title 21 of the United States Code."

The conspiracy charge, as I have already told you, is entirely separate and distinct made from the charges in counts 2 through 7, except 6, the substantive counts. This fact, however, does not preclude you from considering proof of an actual violation as evidence that a conspiracy did exist. Before you may convict a defendant under the conspiracy count, the following essential elements must be

established beyond a reasonable doubt.

First, you must find the existence of the conspiracy charged; that is, that it was a conspiracy to violate the law against distributing or possessing with intent to distribute narcotic drug controlled substances.

Second, you must find that the defendant whom you are considering knowingly and willfully associated himself with the conspiracy with a specific intent to violate the substantive statute.

Third, you must find that one of the alleged conspirators committed at least one of the overt acts set forth in the indictment at or about the time and place alleged.

I shall presently read to you those overt acts as set forth in the indictment.

If the government fails to establish each essential element as to the defendant whom you are considering beyond a reasonable doubt, you must acquit that defendant as to whom the government has failed to establish any element on this count. If it succeeds as to a particular defendant, your duty is to convict that defendant on this count.

The gist of the crime of conspiracy is the unlawful combination or agreement to violate the law. Whether or not the defendant accomplished what it is alleged here, allegedly conspired to do, is immaterial to the question of his guilt

or innocence. A conspiracy has sometimes been called a partnership in criminal purposes in which each member becomes the agent of every other member. To establish a conspiracy the government is not required to show that two or more persons sat around a table and entered into a solemn compact, orally or in writing, stating that they have formed a conspiratorial purpose to violate the law, setting forth details of the plans, the means by which the unlawful project is to be carried out or the part to be played by each conspirator. Indeed, it would be extraordinary if there were such a formal document or specific agreement. Your common sense will tell you that when, in fact, persons undertake to enter into a criminal conspiracy much is left to the unexpressed understanding. Conspirators usually do not reduce their agreements to writing or acknowledge them before a notary public, nor do they publicly broadcast their plans or have public relations people do that for them. From its very nature, a conspiracy is almost invariably secret in its origin and execution.

It is sufficient if two or more persons, and it takes two or more to have a conspiracy, in any manner, through any contrivance, impliedly or tacitly, come to a common understanding to violate the law, express language or specific words are not required to indicate assent or attachment to a

conspiracy.

In determining whether there has been unlawful agreement you may judge acts and conduct of the alleged co-conspirators which are done to carry out an apparent criminal purpose. The adage, "Actions speak louder than words," is applicable here.

Usually the only evidence available is that of disconnected acts which, however, when taken together, in connection with each other, show a conspiracy to secure a particular result as safely and conclusively as more direct proof. The offense is complete when the unlawful agreement is made and any single overt act to effect the object of the conspiracy is thereafter committed by at least one of the co-conspirators.

Proof concerning the accomplishment of the objects of the conspiracy may be the most persuasive evidence of the existence of the conspiracy itself. Success of the venture, if you believe it was successful, may be the best proof of the existence of the agreement.

If upon such consideration of the evidence you find beyond a reasonable doubt that the minds of the alleged conspirators met in an understanding way and that they agreed, as I have explained a conspiratorial agreement to you, to work together in furtherance of the unlawful scheme alleged in the

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464

2 indictment, then proof of the existence of a conspiracy is
3 complete.

4 If you do conclude that a conspiracy as charged did
5 exist, you must next determine whether the defendant on trial
6 was a member of that conspiracy, that is, whether he partici-
7 pated in the alleged conspiracy with knowledge of its unlawful
8 purpose and in furtherance of its unlawful objectives with
9 the specific intent to violate the substantive statute.

10 To find a defendant's membership in an alleged
11 conspiracy you must find that he knowingly and intentionally
12 participated therein, intending to violate the substantive
13 statute; that is, the law against distributing or possessing
14 with intent to distribute drug controlled substances.

15 Mere knowledge by a defendant of the existence
16 of a conspiracy or of an illegal act on the part of an alleged
17 conspirator or mere association with one or more conspirators
18 is not sufficient to establish his membership in the conspiracy.
19 The government must establish beyond a reasonable doubt that
20 the defendant, aware of its basic purposes and objects,
21 entered into the conspiracy with a specific criminal intent;
22 that is, with a purpose to violate the law.

23 So if a defendant with understanding of the unlawful
24 character of the alleged conspiracy intentionally engages,
25 advises or assists for the purpose of furthering the illegal

undertaking, he thereby becomes a knowing and willful participant, a conspirator.

Proof of several separate conspiracies is not proof of the single overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is to determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy. If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit that defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy.

The guilt of a conspirator is not governed by the extent or duration of his participation in a conspiracy or whether he had knowledge of all of its operations. Even if one joined a conspiracy after it was formed and was engaged in it to a degree more limited than that of other co-conspirators, he is equally culpable, so long as he was a co-conspirator.

Each member of a conspiracy may perform separate and distinct acts at different times and different places. Thus some conspirators may play major roles, while others play minor parts. In other words, it is not required that a person be a member of a conspiracy from its very start. He may join it at any point during its progress and be held responsible for all that has been done before he joined and all that may be done thereafter during its existence and while he remains a member.

Simply stated, using the partnership analogy again, by becoming a partner he assumes all the liabilities of the partnership, including those that occurred before he became a member.

Thus if you find that any defendant is a conspirator, then however limited his role in furthering the objectives of the conspiracy, he is responsible for all that was done in furtherance thereof before or after its continuance.

Specifically, to give you an example, if you find that the conspiracy as charged existed and that two persons were members, then if you find that a third or a fourth was also a member and did deliver cocaine to an undercover agent, then the acts of the third person or the fourth person were binding on the other two, even though they were not immediately present.

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2 It is not required that all of the conspirators
3 know each other. They may not have even previously associated
4 together. A defendant may know only one other member
5 of the conspiracy, but if he enters into an unlawful agreement
6 with that other member of the conspiracy, he becomes a party
7 to the whole thing. The question is, did a defendant join
8 one or more others in the conspiracy with awareness of at
9 least some of its basic purposes and aims? If so, then
10 the law treats him as a full member of the conspiracy and
11 he becomes liable for the past and future acts of all
12 the other conspirators.

13 Reference has been made on some of the summations to
14 the fact that or the claim that only a single act was involved
15 as to a particular defendant. A single act may be the basis
16 for drawing an actor within the ambit of of an alleged
17 conspiracy. But since conviction of conspiracy requires an
18 intent to participate in the unlawful enterprises, the
19 single act must be such that one may reasonably infer from it
20 such an intent.

21 Stated another way, a distribution or possession
22 with intent to distribute scarcely constitutes a sufficient
23 basis for inferring an agreement with the opposite parties
24 for whatever period they continued to deal in this kind of
25 contraband, unless some such understanding is evidenced by

other conduct which accompanies or supplements the transaction.

Putting this another way, proof of participation in a single isolated controlled substance transaction standing alone is insufficient to warrant conviction of conspiracy when there is no independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy and an intention to participate therein; that is, when the single transaction is not in itself one from which such knowledge and intent may be inferred.

Assuming first that you have found that the alleged conspiracy existed and second that the defendant you are considering was a member of that conspiracy, I shall now discuss the third element, and that is the requirement of an overt act.

An overt act is any open step, action or conduct which is taken to achieve, accomplish or further the objective of the conspiracy. The purpose of requiring proof of an overt act is that while parties might scheme or conspire and agree to violate the law, they may change their minds and do nothing to carry it into effect, in which event it wouldn't constitute an offense. Conspiracy is not mere thought control. The overt act does not have to be a criminal act nor even the very crime which is the object of the conspiracy.

Now, the overt acts charged in this indictment are

that "On or about July 10, 1975, defendant Walter Sintscha delivered approximately six and a half grams net weight of cocaine in the vicinity of 66 West 84th Street, New York, New York.

"Two, on or about July 23, 1975, defendant Rubin Lopez, also known as John, gave the defendant Walter Sintscha approximately 28 grams of cocaine.

"Three, on or about July 25, 1975, defendant Fernando Padron made a phone call from a phone booth at a Mobil gas station in the vicinity of 165th Street and Hillside Avenue, Queens, New York.

"Four, on or about July 25, 1975, defendant Fernando Padron walked to a red Datsun parked in the vicinity of 165th Street and Hillside Avenue, Queens, New York.

"Five, on or about July 25, 1975, defendant Edward Monticelli, also known as Carlos, delivered 98½ grams of cocaine to defendant Armando Delbarrio, also known as Al, in the vicinity of 162-15 Highland Avenue, Queens, New York.

"Seven, on or about August 6, 1975, defendants Walter Sintscha and Rubin Lopez, also known as John, discussed the sale of two ounces of cocaine in Neil Brothers' Bar, New York, New York.

"Eight, on or about August 7, 1975, the defendant Rubin Lopez, also known as John, handed two ounces of cocaine

to defendant Walter Sintscha in apartment 5A, 66 West 84th Street, New York, New York.

"Nine, on or about August 7, 1975, defendant Walter Sintscha counted and handed \$3000 to defendant Rubin Lopez, also known as John."

Now, obviously, for example, for Fernando Padron to make a phone call at a booth in a Mobil gas station is in itself possibly innocent conduct. But if, as the government contends, this was to arrange for the distribution of narcotics, this phone call sheds its innocent appearance. It is an overt act by an alleged conspirator in furtherance of the objective of the conspiracy. It is not necessary for the government to prove that each member of the conspiracy committed or participated in any particular overt act. Since the act of anyone done in furtherance of the conspiracy becomes the act of all the other members. Thus it is not necessary that the government prove that any particular member of the conspiracy participated in all of the overt acts that he is named in, as long as it proves at least one of the listed overt acts.

Also the government is not required to prove each of the overt acts as alleged in the indictment. It is sufficient, if it proves the commission of any one of the acts in the Southern District of New York, which includes the

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2 City of New York, at or about the time alleged, it includes
3 the City of New York excluding Brooklyn, Queens and Staten
4 Island.

5 Although in this case the government claims it has
6 proved each act set forth in the indictment, the overt
7 act need not have occurred at the precise time or place as
8 alleged.

9 I want to go back at this moment to two of the
10 substantive counts; that is, counts 3 and 5. There is another
11 alternative basis upon which you may find the defendant
12 Lopez, named in these substantive counts, guilty on each of
13 these counts even if you are not satisfied that each of the
14 elements I have previously described has been proven beyond
15 a reasonable doubt as to Lopez. This alternative basis is
16 as follows: if you find beyond a reasonable doubt that the
17 substantive offense alleged in each of those counts was
18 committed by Sintscha and he is found to be a member of the
19 alleged conspiracy, and if Lopez is also found to be a member
20 of the same alleged conspiracy and that the acts which con-
21 stituted the offense were done in furtherance of a portion
22 of the alleged conspiracy, of which Lopez is found to be a
23 member, and that Lopez might reasonably have foreseen that
24 those acts would be done by his alleged partner in crime,
25 you may find that Lopez is guilty of the offense if committed

by Stinscha, even though Lopez did not personally participate in the acts constituting the offense or did not have knowledge of them.

Now, there has been testimony before you with respect to the use by the narcotic agents of the services of an informant or an informer. Whatever you think of informers, the government uses them in order to get leads to those who are violating the law, and this is entirely proper. Whether you and I disapprove of that really is beside the point, provided that such services in no wise infringe upon the rights of the defendant, because the use of such services is not forbidden by law. You are not being asked to determine whether or not you agree with the policy endorsing the use of informants.

Putting it another way, if you are satisfied beyond a reasonable doubt, as I have already defined reasonable doubt to you, that the defendants committed the offenses as charged in the indictment, you may find them guilty, even though you believe their apprehension came about in some measure by the government availing itself of the services of an informant.

Defense counsel has urged a defense of entrapment and it has been mentioned in the summations, and I will now advise you as to what that term of law means and

2 what it does not mean. The fact that I instruct you on this
3 subject does not mean that I believe there is any evidence
4 to sustain such an offense. I give you the instruction as
5 the legal guide on the subject. You will have to say what
6 the facts and circumstances in evidence add up to.

7 Entrapment exists only when a government agent
8 or agents induce and originate the commission of a crime
9 without the aid of any prior criminal intent or purpose
10 on the part of the defendant. There is no entrapment when
11 the criminal intent or purpose is already present and the
12 agent or agents merely afford the opportunity for the
13 commission of the crime and seek to apprehend the perpetrator.
14 When the criminal design originates with officials of the
15 government and they implant in the mind of an innocent person
16 the disposition to commit the alleged offense and induce
17 its commission by solicitation, proposition, suggestion or the
18 like in order that they might prosecute, the defense of
19 entrapment arises.

20 However, you must bear in mind, and I instruct
21 you as a matter of law, that it is a valid reply to a con-
22 tention of entrapment if the government has satisfied you
23 beyond a reasonable doubt that the defendant was ready and
24 willing to commit the offense charged and was awaiting any
25 propitious opportunity to commit the offense when such an

2 opportunity was afforded by government officials. You
3 must be satisfied beyond a reasonable doubt that the govern-
4 ment did not seduce an otherwise innocent person, but only
5 provided the means for the accused to realize a pre-existing
6 purpose.

7 The evidence shows that on several occasions Detective
8 Caracappa discussed narcotics with Walter Sintscha and these
9 conversations were taped with a recording device. Just in
10 case you might have some doubts on this subject, I am
11 instructing you that the use of such a device in the manner
12 described in this case is entirely within the law and
13 violates no one's rights. This is so essentially because
14 Detective Caracappa, who was a participant in the conversation,
15 was entitled by law to record his own telephone talks with
16 or without the knowledge of the other party to the phone talk.
17 Accordingly, the use of these devices was a proper investigative
18 technique. This is not what you may have read about as wire-
19 tapping that is not permitted except on proper legal authori-
20 zation and court order. No court order is needed to record
21 your own talks anymore than if your own secretary was taking
22 it down when it occurred.

23 The duty of imposing sentence rests exclusively upon
24 a judge. Your function is to weigh the evidence in the case
25 and to determine the guilt or innocence of the defendants

solely upon the basis of the evidence and the law. Under your oath as jurors you cannot allow a consideration of the punishment which might be inflicted upon a defendant, if convicted, to influence you in your verdict in any way or in any sense enter into your deliberations. You are to decide the case upon the evidence and the evidence alone and you must not be influenced by any assumptions, conjectures or any inferences not warranted by the facts until proven to your satisfaction.

You must consider the guilt or innocence of each defendant individually on each count. Further, as you probably already know, a verdict of guilty or not guilty on the count on which you are reporting must be unanimous to be acceptable. The issues for you to decide relate to offenses under the narcotic laws. We are not engaged in a popularity contest. When you enter the jury box you are not expected to check your common sense outside. You should use your common sense and general experience in evaluating all the testimony and circumstances in evidence and not be confined or diverted from the task that you are here to perform. That task is to find the facts.

If you desire any of the exhibits those will be sent to you in the jury room upon request. If you want any of the testimony read, that can be done also. You can have

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476

2 the tapes replayed if you want those. Please do not communi-
3 cate with anyone concerning your deliberations about this
4 case except in writing signed by your foreman, Mr. Albert
5 Hayward, H-a-y-w-a-r-d, the gentleman who sits in the first
6 seat. He will be provided with a pencil and paper.

7 I would like to take a moment to talk to the lawyers
8 at the side bar. They may wish to call to my attention
9 any matter which I have overlooked or where I may have mis-
10 spoken, and I will ask you to relax for a moment while I do
11 that.

12 (At the side bar)

13 THE COURT: Any exceptions or requests on the part
14 of the government?

15 MR. BATCHELDER: The duration of the conspiracy.
16 That was the only one. That it doesn't have to start right
17 on the day.

18 THE COURT: I don't think that is necessary.
19 Technically that is correct but I don't think it is necessary.

20 MR. BLACKETT: I don't think your Honor defined the
21 word "intent." You stated it but you didn't define it.

22 THE COURT: I didn't define intention?

23 MR. BLACKETT: Or intent.

24 THE COURT: I think I clearly indicated that it
25 should be something other than mistake or inadvertence. What

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else do you want me to say about it?

MR. BLACKETT: I don't believe your Honor used those words in connection with the word "intent."

(Pause)

MR. BLACKETT: I should like to have heard the words "volition" and free will" used with the word "intent."

THE COURT: I charged that the terms unlawfully, willfully and knowingly mean that you must be satisfied beyond a reasonable doubt that the defendant knew what he was doing; that he acted deliberately and voluntarily as opposed to mistakenly or accidentally or as a result of some coercion.

What else do you want me to say?

MR. BLACKETT: I would like you to have used the word --

THE COURT: You write out what you want me to say and I will consider it. I think it is sufficiently covered but if there is anything you think is omitted, you just write out a sentence and I will take care of it. Here is a piece of paper (handing).

Any exceptions and requests on behalf of defendant Edward Montiel?

MR. AMSTERDAM: Yes, there are. In regard to reasonable doubt you stated it in the positive, that is, as you would be willing to act, instead of the negative, as

2 would cause you to hesitate to act.

3 THE COURT: You object to the definition of reason-
4 able doubt?

5 MR. AMSTERDAM: Yes.

6 THE COURT: I will stand on the charge as given.

7 What else?

8 MR. AMSTERDAM: Giving the background of the drug
9 act in regard to especially the defendant Montiel I think
10 is extremely prejudicial and perhaps the jury should be
11 instructed that they not consider the background of the act
12 for purposes of this case.

13 THE COURT: What else?

14 MR. AMSTERDAM: The same thing with background of
15 conspiracy being worse than a substantive offense for those
16 defendants that are merely charged with conspiracy.

17 THE COURT: These are charges that have gone to the
18 Court of Appeals on every case and never have been questioned.

19 MR. AMSTERDAM: Conspiracy it seemed to be weighted
20 much more in terms of acts rather than the unlawful agree-
21 ment. The mention of similarity of conduct, the mere
22 presence, mere willing participation was just really glossed
23 over in terms of the whole charge.

24 THE COURT: That charge has gone to the Court of
25 Appeals on almost every case, also.

Have you anything new?

MR. AMSTERDAM: On the single act, you said that they have to find something independent, something independent as to justify it. I think we have to tie that into reasonable doubt, that they have to find beyond a reasonable doubt that that independent act justifies it.

THE COURT: The burden of proof in every element in the case is on the government to prove beyond a reasonable doubt. That was stressed time and time again and doesn't have to be weighted every third sentence.

What else?

MR. AMSTERDAM: My last request, which was request number 6, dealing with Montfell's lack of criminal intent on his informant status was not mentioned at all. I think they should be instructed if they believed he was acting in that function --

THE COURT: That is a way of particularizing and overweighing the charge in your favor. I would decline to charge that.

MR. AMSTERDAM: That is all I have.

THE COURT: Any exceptions or requests on behalf of the defendant Rubin Lopez?

MR. FREEDMAN: Other than joining in some of Mr. Amsterdam's requests, would you like me to go through the

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480

2 list with you and say which one I join in?

3 THE COURT: This is the time when you are obligated
4 to make your individual statements.

5 MR. FREEDMAN: I would make the same statements
6 Mr. Amsterdam made with respect to the charge on reasonable
7 doubt with respect to the Drug Control Abuse Act, with respect
8 to the charge on conspiracy.

9 I would also take exception to your Honor's use
10 of the Pinkerton charge with respect to Mr. Lopez. As I
11 recall your Honor did charge that. I think that your Honor's
12 charge when one joins a conspiracy he is responsible for the
13 acts previously committed was somewhat confusing with,
14 because in the second time you referred to it you said if
15 you join one of the conspirators and that conspirator is
16 engaged in conspiracy with the others, then you have joined
17 with the others. In that context, and I don't have the
18 exact language your Honor used, I believe, particularly with
19 respect to Mr. Lopez where there is some question about the
20 Queens deals which did not involve him, that may prejudice
21 him in front of the jury with respect to whether if he
22 joined in the conspiracy with Mr. Sintscha, he also thereby
23 joined in the conspiracy with the others if he didn't know
24 the others or didn't know there was another aspect of the
25 conspiracy.

1 THE COURT: I made it very clear under the
2
3 Tramunti charge that they had to find that there was a
4 joinder in the conspiracy charged in the indictment and
5 that that was the only basis on which there could be a con-
6 viction.

7 MR. FREEDMAN: To the extent to which your Honor
8 did not grant the requests to charge by the defendant --

9 THE COURT: I will not accept any dragnets. You
10 will have to state what it is I didn't do. I think I charged
11 every one of your requests as a matter of fact. But you
12 will have to be specific at this point.

13 MR. FREEDMAN: Specifically with reference to
14 the single conspiracy element as they were defined in
15 the Bertolotti case. I think there is at least some confusion
16 in that and the extent to which your Honor did not discuss
17 the question I would except.

18 (Pause)

19 THE COURT: I decline to charge in the language
20 requested in your request number 9, which is Court's Exhibit
21 13.

22 MR. FREEDMAN: With respect to the aiding and abetting
23 charge I would except to the extent that your Honor did not
24 specifically state that Mr. Lopez would be required as an
25 aider and abetter to have the same intent that Mr. Sintsoha

2 had in committing the events charged in count 3 of the
3 indictment.

4 THE COURT: I decline to charge beyond what has
5 always been charged on that subject.

6 THE COURT: Any exceptions or requests on the part
7 of the defendant Walter Sintscha?

8 MR. BLACKETT: With respect to criminal intent I
9 should like to have the Court instruct the jury as follows:
10 intent is a free act of the will or volition uninfluenced by
11 outside force of another in whatever form. That is it.

12 THE COURT: All right, I will charge that.

13 What else? Is that everything?

14 MR. BLACKETT: That is it.

15 THE COURT: Any exceptions or requests on the part
16 of the defendant Padron?

17 MR. STEINBOCK: Yes. First of all I would request
18 that you mark as a Court's Exhibit the last request that
19 was handed up.

20 THE COURT: I think it is unconscionable conduct on
21 your part when you submit a documented series of requests to
22 charge and file it in the clerk's office on December 4th,
23 to wait until the morning of the charge at one minute before
24 I am about to deliver the charge to hand me a handwritten
25 note that you could have furnished me with at the close of the

2 court's session last night when I would have had the oppor-
3 tunity to frame a proper charge on the subject of missing
4 witnesses, if any, and then expect me to charge. I do not
5 think that comports with the standard required of lawyers in
6 this district.

7 MR. STEINBOCK: I apologize to your Honor.

8 THE COURT: I am not asking for your apology, I
9 am questioning the practice. It is just wrong. You cannot
10 expect a judge to do these kind of things on horseback and
11 it could not have been a brilliant stroke on your part one
12 minute before the charge.

13 MR. STEINBOCK: I could have done it yesterday.
14 There is no excuse. I showed a typewritten --

15 THE COURT: I'm not interested whether it was hand-
16 written or not. I am interested in the timing. It will
17 be marked as a Court's exhibit with these remarks.

18 MR. STEINBOCK: As long as it is clear that I would
19 request the failure to call witnesses charged.

20 The second thing is that I take exception to the
21 charge on reasonable doubt, the part particularly that you
22 are beset by doubt and uncertainty and unsure of your judg-
23 ment. You don't have to be beset by doubt to have reasonable
24 doubt. Along those lines in the beyond the reasonable
25 doubt charge, it is not caprice or whim, I would except to that.

2 The beyond a reasonable doubt is emphasized what it is not,
3 rather than emphasizing what it is. I except on that basis.

4 There is one other aspect of the beyond a reasonable
5 doubt charge which also appeared in the conspiracy charge,
6 where your Honor mentions that if you find beyond a reason-
7 able doubt it is your duty to convict. I submit that the jury
8 should be instructed they may convict.

9 THE COURT: That is exactly what I did say. I
10 didn't say duty to convict, I said may.

11 MR. STEINBOCK: Twice you did and the other you
12 didn't.

13 THE COURT: I think either is correct and both together
14 would be correct.

15 MR. STEINBOCK: I join in the objection to the
16 description of the purpose of the conspiracy statute and
17 the drug statute, particularly the allusion to the serious
18 effect on the health and welfare of the people with respect
19 to narcotics. I believe that is unnecessary.

20 THE COURT: We are not here to play a game of ping
21 pong.

22 MR. STEINBOCK: I object to the charge on the ground
23 that conspiracy presents a greater detriment to the public
24 and the Congress' intent particularly since conspiracy carries
25 no greater penalty than the substantive counts.

On the conspiracy charge itself, your Honor, while you did charge on mere association not being sufficient, you did not charge as requested in my request number 7 that even presence at the scene of the crime is not sufficient to establish participation in a conspiracy.

I also take exception to the description of the analogy of conspiracy to a partnership for criminal purposes which appeared a couple of times, and to the emphasis in the charge on the fact that disconnected acts can establish agreement and the accomplishment of objects of the conspiracy is the most persuasive evidence of the existence of the conspiracy.

I join with Mr. Amsterdam in requesting that you discuss with the jury the necessity of finding an agreement before they can find that conspiracy exists.

I further except to the failure to charge as requested in my request 6 that you must find on the evidence of what he did, any given defendant did, that he was a member of the conspiracy before you may find that he participated in it. The request that I made on participation particularly in the conspiracy.

I believe there was a reference at one point to however a limited role the defendant participated, he is involved in the conspiracy. I think that, again, that over-

emphasizes the small amount of proof that is required to show participation rather than discussing the elements in general.

My most serious objection, however, your Honor --

THE COURT: You mean the others haven't been serious?

MR. STEINBOCK: My most serious.

THE COURT: I think you ought to read some of the authorities in the Second Circuit, as I listen to you.

MR. STEINBOCK: I don't contend every one of them has not been on occasion supported by the Second Circuit but it is impossible to raise these on appeal in this case if I don't object at this point.

This objection is the most serious. After you read the overt acts in the indictment you read, I believe, verbatim a paragraph from government's request number 12, which begins "Obviously for Fernando Padilla to make a phone call from a booth at a Mobil gas station its may be an innocent act." It goes on to say in the request, at least by the government, "But the government contends this was to arrange the distribution of narcotics, and if that happened this phone call sheds its innocent appearance."

I object to that on a few grounds. One, I believe it adopts and re-emphasizes the government theory here without any mention of the fact that the defendant intends that there are alternative explanations for that conduct. But I

object more to the mention of Fernando Padron at that point. That is particularly true because of all the overt acts it singles him out. I believe the government has compared to Rubin Lopez and Sintscha the weakest case in the conspiracy --

THE COURT: You are not arguing your appeal now. This is supposed to be exceptions and requests.

MR. STEINBOCK: I am giving my reasons.

THE COURT: I don't care about your reasons. The request is so farfetched I don't need any reason for it.

MR. STEINBOCK: I would request your Honor should inform the jury that comment is withdrawn or that you mention to the jury that you do not by any means mean to imply that that bit of evidence does demonstrate that he participated in the conspiracy and that the defense contends it does not.

That is the last request.

THE COURT: Thank you.

(In open court)

(Court's Exhibit 18 is marked.)

THE COURT: The only matter that I wish further to call to your attention is that you should consider this definition of intent. Intent is the free act of the will or volition uninfluenced by outside force of another in whatever form.

The marshal may be sworn.

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488

2 (Marshal sworn)

3 THE COURT: Mark this as Court's Exhibit 19.

xxx 4 (Court's Exhibit 19 is marked.)

5 THE COURT: Mr. Foreman, I have prepared a form of
6 verdict with a copy for each of the jurors. The typewritten
7 one on top is the one that is the original. The others are
8 Xerox copies for convenience.

9 We have two alternate jurors, Mrs. John and Mrs.
10 Thompson, and thank you very much for attending on this
11 trial and being available for purposes of its final disposi-
12 tion. I now excuse you from further service in this case.

13 (Alternate jurors excused)

14 THE COURT: As soon as the alternates have gathered
15 their belongings up you may go and retire.

16 (Pause)

17 THE COURT: I think that you may now go out to
18 deliberate.

19 (Jury commences deliberations at 11:00 a.m.)

20 (Jury note at 11:05 a.m.)

21 THE COURT: I have a note from the jury. "May we
22 please have a copy of the indictment?"

23 MR. BATCHELDER: This is it, sir. I have checked
24 it with everybody.

25 MR. STEINBOCK: I didn't see it.

2 MR. BATCHELDER: You may look at it (handing).

3 (Pause)

4 (Jury note at 12:00 p.m.)

5 (In open court, jury not present)

6 THE COURT: The jury has requested Carcappa's testi-
7 mony relating to July 23rd and August 7th, and also Govern-
8 ment's Exhibits 4 and 9.

9 (In open court, jury present)

10 THE COURT: Mr. Foreman, we have your note request-
11 ing the testimony of July 23rd and August 7th of Detective
12 Caracappa. We will have the reporter read it from his notes.
13 After he has read the testimony, and this will be the reading
14 of the testimony by the government, at the instance of the
15 government attorney. You let me know whether you want any
16 further testimony at the instance of any other defendant's
17 counsel, which we haven't looked for at the moment. I
18 don't know whether that was part of the request and I don't
19 know whether there was any to tell you the truth. I would
20 have to check it out.

21 Then you asked for Exhibits 4 and 9. Now, is the
22 Exhibit 4 you want the tape of July 23rd?

23 THE FOREMAN: No, sir.

24 THE COURT: It was the pretrial number?

25 THE FOREMAN: It's the package up there which we want

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490

2 to see.

3 THE COURT: I understand that.

4 We will have the testimony read to you.

5 (Testimony of Caracappa referred to is read.)

6 THE COURT: Anything further you want to have read
7 at this time?

8 JUROR NUMBER 5: Could we have a copy of the indict-
9 ment, please?

10 THE COURT: There is one in the jury room, isn't
11 there? The clerk will get the one from the jury room. I
12 don't happen to have an extra copy here.

13 (Pause)

14 JUROR NUMBER 5: What we wanted was the testimony
15 concerning the count -- it's the same count that this testi-
16 mony was on.

17 THE COURT: Let me call these off to you. Count 2
18 was July 10th, count 3 was July 23rd --

19 JUROR NUMBER 5: That's the one. Against Lopez
20 and Sintscha.

21 THE COURT: July 23rd. What is it you want about
22 that?

23 JUROR NUMBER 5: I guess it's Bradley's testimony.

24 THE COURT: Bradley's testimony? In other words,
25 you would like to have such testimony as relates to July

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491

2 23rd; is that what you want?

3 JUROR NUMBER 5: As it relates to that count.

4 (Pause)

5 THE COURT: First let's take up Bradley's testimony
6 on July 23rd and see whether that is part of what is wanted
7 by the jury.

8 THE COURT: Go back to the place where you were on
9 August 7th and just back up a little in your notes and see
10 if there isn't an account of July 23rd by Detective Caracappa.

11 (Testimony of Detective Caracappa read)

12 THE COURT: Anything else in the testimony that you
13 can think of, Mr. Foreman, that you want to have read?

14 JUROR NUMBER 5: Can we talk for just a second?

15 THE COURT: Surely.

16 (Pause)

17 THE FOREMAN: That is all, your Honor.

18 THE COURT: Is that all for the present?

19 THE FOREMAN: Yes, sir.

20 THE COURT: The marshal will hand you the two
21 exhibits that you have requested.

22 (Jury continues deliberations at 12:25 p.m.)

23 (Jury note at 3:10 p.m.)

24 (In open court - jury not present)

25 THE COURT: This request that I have seen a couple

of hours after the jury started deliberating, what does this mean?

MR. BLACKETT: I feel, your Honor, and I really didn't think about it until lunch, that the statement you made to the jury that the government usually uses informants to do the kind of thing this girl Pat did -

THE COURT: Most unusual after the jury went out. The jury went out at eleven this morning and here you hand me a note, which catches up with me at 3:15, although you date it 2:15. Regardless of that fact you say three hours after the jury commences its deliberations you want me to tell the jury something.

MR. BLACKETT: Your Honor, that is permissible.

THE COURT: I know it is permissible and also I can ignore it.

MR. BLACKETT: You can instruct the jury even after it's gone out to deliberate.

THE COURT: The note is marked Court's Exhibit 20. I decline to deal with any aspect of the charge at this late point.

(Court's Exhibit 20 is marked.)

THE COURT: I have a note from the jury now, "May we please hear the testimony of Detective Hayward and Detective Caracappa concerning Edward Montiel?"

xxxx

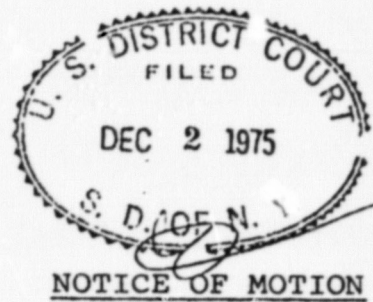
2 (Jury present)

3 THE COURT: Mr. Foreman, we have found the places
4 in the notes. You see it takes a little time to find it
5 on the tapes and the reporter will read the testimony of
6 Detective Caracappa concerning Edward Montiel and then
7 the testimony of Detective Hayward concerning Edward Montiel.

8 (Portions of Detective Caracappa's testimony and
9 the direct and cross examination of Mr. Hayward are read to
10 the jury.)

11 (Jury continues deliberations at 3:45 p.m.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
UNITED STATES OF AMERICA,

- against -

RUBEN LOPEZ,

Defendant.
-----X

75 Cr. 938 (MP)

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Lewis R. Friedman, sworn to the 1st day of December, 1975, and upon the indictment and all of the prior proceedings had herein, the undersigned will move this Court at a Motion Part thereof to be held before the Honorable Milton Pollack, United States District Judge, at a time and place to be fixed by the Court for an order:

(1) pursuant to F.R.Cr.P. 14 severing Ruben Lopez's trial from that of the other defendants,

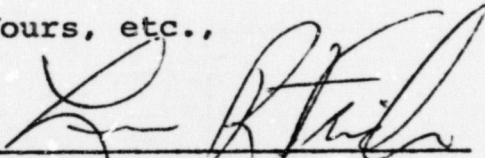
(2) for an order suppressing the statement allegedly given by the defendant Ruben Lopez to an Assistant United States Attorney on the grounds that that statement was obtained in violation of the defendant's rights under Miranda v. Arizona, 384 U.S. 436 (1966), and

(3) for an order amending the indictment by striking therefrom the phrase "a/k/a John" on the grounds that such reference in the indictment to the defendant is prejudicial,

(4) for an order authorizing the defendant to appear pro se as co-counsel, and

(5) for such other and further relief as the Court may deem just and proper.

Yours, etc.,



LEWIS R. FRIEDMAN
Attorney for Defendant
Litman, Friedman & Kaufman
120 Broadway, Suite 1118
New York, New York 10005
(212) 349-6750

TO: THOMAS J. CAHILL
United States Attorney
Southern District of New York
1 St. Andrew's Plaza
New York, New York

-----X
:
UNITED STATES OF AMERICA, :
:
:
- against - : AFFIDAVIT
:
RUBEN LOPEZ, : 75 Cr. 938 (MP)
:
Defendant. :
:
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LEWIS R. FRIEDMAN, being duly sworn, deposes and says:

2. The delay in making the instant motions is that informal discovery was only completed this morning.

3. The indictment charges that from on or about July, 1975, to the date of the filing of the indictment, the defendant Ruben Lopez and five other persons engaged in a narcotics conspiracy pursuant to 21 USC 812, 841(a)(1) and 841(b)(1)(A). (Count One). Of the remaining six counts, the defendant Ruben Lopez and Walter Sintscha are charged with the distribution of cocaine (Counts Three and Five); the remaining four charged defendants other than

Mr. Lopez with the distribution of cocaine (Counts Two, Four, Six and Seven).

Severance

4. A severance is required because, as the result of the pre-trial discovery, it appears that the Government will prove the existence of more than the single conspiracy charged in the indictment. From a review of the Government's discovery documents, it appears that at least two separate conspiracies will be proven.

5. A severance is also required in the furtherance of justice since it appears that the inconsistent defenses to be offered by the other defendants will have a "spill-over" effect on the defendant Lopez and will prejudice his case. On information and belief the defendant Montiehl will assert a defense that he was a Government informant at all times referred to during the alleged conspiracy. Mr. Montiehl's defense will require proof of the nature of his information and the wide ranging operations of his drug connected schemes. On information and belief the defendant Sintscha may well assert a defense of entrapment. The nature of the proof required for such a defense obviously will be prejudicial to Mr. Lopez. On information and belief defendant Padron

will assert a defense that he had no connection with or did not perform the acts charged in the indictment. We have been informed that the defendants Delbarrio will be Government witnesses at trial. Based on all of these considerations, it is difficult if not impossible for the defendant Lopez to assert a defense to the charges which involve him. The nature of his defense and decision whether he should testify are matters which cannot be meaningfully resolved in the course of a joint trial.

Motion to Strike the Name "John" from the Indictment

6. I have spoken to Mr. Lopez who informs me that at no time has he ever been called John. Further, he informs me, that he has not been introduced to anyone by the name John. While it may be that the Government's proof during the trial will be that the agent knew the defendant Lopez by the name "John", the presence of the alias in the indictment cannot help but provide an unfavorable bias in the minds of the jurors.

Motion to Suppress the Defendant's Alleged Statement

7. I have been given a copy of an alleged statement made by Mr. Lopez to an Assistant United States Attorney on the date of his arrest prior to arraignment. A copy of that statement is annexed hereto as an exhibit. As can be seen

from the answer to the fifth question on the first page, the defendant, in the middle of questioning, "makes a phone call re: obtaining a lawyer". The questioning continued thereafter and an alleged statement was obtained from Mr. Lopez. Since the defendant had requested counsel, the statement was obtained in violation of his rights pursuant to Miranda v. Arizona.

The Motion to Appear pro se as Co-counsel

8. I have been assigned to represent Mr. Lopez pursuant to the Criminal Justice Act. Mr. Lopez, who is without funds, requests permission to appear as co-counsel. Mr. Lopez has assured me that he is sufficiently familiar with the procedures of the Court so that he would not disrupt the proceedings if given the opportunity requested. I have sufficiently assured myself that Mr. Lopez does not intend to disrupt the trial and I believe it is in furtherance of his constitutional rights that he be allowed to act as co-counsel.

WHEREFORE, the relief requested should be granted.


Lewis R. Friedman

Sworn to before me this the
1st day of December, 1975



NAME OF DEFENDANT

Ruben Lopez

Form No. USA 33s-306 p. 1
Rev. 1975

STATEMENT OF DEFENDANT BEFORE ARRAIGNMENT
MADE TO ASSISTANT UNITED STATES ATTORNEY

Date:

9/11/75

Time Interview Commenced:

11:25

a.m.

p.m.

Q My name is A-R-K, I am an Assistant United States Attorney. You have been arrested for a violation of 21 USC § 846 which relates to conv. to dist. court. In a few minutes you will be taken before the United States Magistrate who will fix bail in your case. Do you understand that?

A

Yes

Q You have a constitutional right to refuse to answer any of my questions. Do you understand that?

A

Yes I do

Q You have an absolute right to remain silent, and if you choose to answer any questions, any statement you do make can be used against you in a court of law. Do you understand that?

A

Yes

Q You have a right to consult an attorney and to have that attorney present during this interview. Do you understand that?

A

Yes

choose to answer any questions, any statement you do make
can be used against you in a court of law.
Do you understand that?

A

Yes

Q You have a right to consult an attorney and to have
that attorney present during this interview. Do you
understand that?

A

Yes

Q If you do not have funds to retain an attorney
an attorney will be appointed to represent you and
you do not have to answer any questions before this
attorney is appointed and you can consult with him.
Do you understand that?

Makes a
phone call
in obtaining a
lawyer.

A.

Yes

Q Would you like to answer some questions about your background?
You may pick and choose those questions you wish to answer,
and you may stop at any time.

NAME: *Ruben Lopez*
Never used the name
"John" he says
 SPOUSE: *Miriam*
 CHILDREN: *0*

DOB: *5/11/42* MARITAL STATUS: *married*
separated
 SOCIAL SECURITY NUMBER: *(31)-32-0106*
 DOB: *12/28/37*

ADDRESS: *324 E. 72nd St.*
NYC

APT. *1 N* RENT: *\$250*
 BEGAN LIVING THERE: *1 month ago*

HOME TELEPHONE: *228 9416*

PREVIOUS ADDRESS: *66 W. 84th St.*
NYC.

DATES: *about 2 yrs.*
in NYC 23 yrs.

EMPLOYED: *unemployed*

HOW LONG: *7 months*

BUS. PHONE:

WAGES:

PREVIOUS EMPLOYMENT: *Campbell Soup - sales management (6 yrs)*
was laid off.

WAGES: *\$14,000/yr.*

PARENTS: *Angel & Delia Lopez* ADDRESS: *Puerto Rico*

WHO RESIDES WITH YOU? *Walter Sirtsch*

WELFARE?
 FOOD STAMPS?
 UNEMPLOYMENT?

No
Have applied for
unemployment insurance

SELF:
 AMOUNT:

SPOUSE

PROGRAM:
 LOCATION:

ARRESTS:

-1-

-2-

-3-

-4-

PLACE

CHARGE

DISPOSITION

SENTENCE

TIME SERVED

Claims none

PARENTS: *Walter & Maria Lopez* ADDRESS: *Puerto Rico*
WHO RESIDES WITH YOU? *Walter Sintes*

WELFARE?
FOOD STAMPS?
UNEMPLOYMENT?

No
Have applied for unemployment insurance

SELF:
AMOUNT:

SPOUSE

PROGRAM:
LOCATION:

ARRESTS:

-1-

-2-

-3-

-4-

PLACE

Chen's home

CHARGE

DISPOSITION

SENTENCE

TIME SERVED

PROBATION

EDUCATION:

YEARS:

2 yrs college - Bklyn & City

WHERE:

CURRENT MEDICAL PROBLEMS:

PHYSICAL:

No

MENTAL:

HAVE YOU TAKEN OR ARE YOU NOW TAKING DRUGS? No HEROIN () COCAINE (),

ADDICT?

MARIJUANA OR HASHISH ():

EVER ADDICTED?

AMPHETAMINES (),

WHAT DRUG?

METHADONE (),

DRUG PROGRAM?

LSD (), OTHER:

ALCOHOL?

DO YOU (OR YOUR SPOUSE) HAVE ANY BANK ACCOUNT? No

WHERE:

FINANCIAL:

CASH ON PERSON ~\$703

SAVINGS No

STOCKS OR BONDS No

CAR No

HOUSE No

OTHER PROPERTY No

DOES YOUR SPOUSE WORK?

WHERE?

CITIZEN OF: USA

ENTRY TO U.S. DATE: 1952

PLACE OF BIRTH: Arecibo, P.R. PORT OF ENTRY:

ALIEN REGISTRATION NUMBER: —

REGISTERED WITH SELECTIVE SERVICE? Yes

HAVE YOU EVER SERVED IN THE ARMED FORCES? No WHEN?

TYPE OF DISCHARGE?

DO YOU HAVE ANY RELATIVES IN N. Y. AREA, OTHER THAN THOSE MENTIONED ABOVE?

Yes, but don't keep in touch.

NAME:

ADDRESS:

WHEN WERE YOU ARRESTED? Last night.

WHERE? My apt.

DO YOU HAVE ANY COMPLAINTS ABOUT THE WAY THE AGENTS TREATED YOU? No physical mistreatment. Just complains about harassment since he never did anything.

Lopez asked me what the charges were against him. He asked me this after he made some phone calls in an unsuccessful attempt to contact a lawyer. I told him what the charges were by reading to him the over acts charged in the complaint in which he was named. I also informed him that there was an undercover agent (police officer) present at those incidents. Lopez then asked to explain what happened. Before I allowed him to do so, I again asked him if he understood his rights. He said he did, and insisted on explaining what had happened. Lopez said that the undercover agent, a guy named Steve, came around to the apartment where Sintscha and Lopez were living. Steve wanted to buy a lot of cocaine, ^{from Sintscha} and he was persistent. ~~He said that he was a Mafia guy, but we figured we could lead him on to think we could supply heavy weight, and then take his money when he showed up. Once, Steve~~ He decided to rip the guy off. He was saying that he was a Mafia guy, but we figured we could lead him on to think we could supply heavy weight, and then take his money when he showed up. Once, Steve

Lopez said that in November 1977
Steve, came around to the apartment where
Sintschla and Lopez were living. Steve wanted
to buy a lot of cocaine, ^{from Sintschla} and he was persistent.
~~the deal was off, but~~ he decided to rip
the guy off. He was saying that he was a Mafia
guy, and we figured we could lead him on
to think we could supply heavy weight, and then
take his money when he showed up. Once, Steve
showed up with \$16,000. We didn't rip him off
because we thought he'd be good for a lot
more. ^{Sintschla} told him that we didn't have the
stuff. I never saw Steve after that. I
never sold cocaine.

Lopez says he doesn't know Edward
Monticelli, aka Carlos. Says he met Armando
and Paula Delbarrio once. Lopez knows

DEFENDANT'S STATEMENT - Continued.

Fernando Padron - Padron was also living in Lopez's apartment.

Lopez says that the substance taken from him when arrested was a vitamin powder → inositol.

Talked with Lopez about cocaine. He said he'd read a book called the Cocaine Papers. Said that Freud used it, McKinley used it, a lot of great people used it.

TIME INTERVIEW TERMINATED: a.m./2:10 p.m.

WITNESSED: ASSISTANT U. S. ATTORNEY Robert R. Kautman

AGENTS: Det. V. A. H. H. H.

BAIL RECOMMENDED:

\$7,500

BAIL SET BY MAGISTRATE:

\$7,500

POSSIBLE BAIL SUGGESTED

BY DEFENDANT: The money I had yesterday

TIME OF
ARRAIGNMENT

666-9500

SUITE 1312

TIME INTERVIEW TERMINATED:

a.m./2:10 p.m.

WITNESSED: ASSISTANT U. S. ATTORNEY

AGENTS:

BAIL RECOMMENDED:

\$7,500

BAIL SET BY MAGISTRATE:

\$7,500

HEARING:

BAIL WARNINGS GIVEN?

POSSIBLE BAIL SUGGESTED

BY DEFENDANT:

TIME OF
ARRAIGNMENT

666-9500

SUITE 1212

LAWYER

MELVYN J. SOLOMON
ATTORNEY AT LAW

T

GARFIELD & SOLOMON

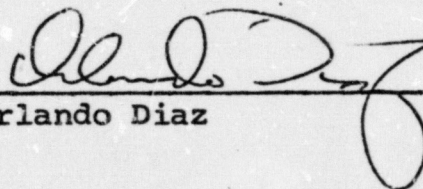
11 PARK PLACE
NEW YORK, N. Y. 10007

APPOINTED OR RETAINED (CIRCLE ONE)

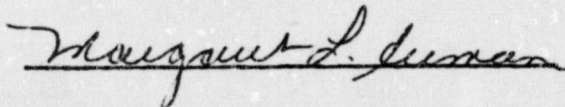
Wants appointed counsel.

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

ORLANDO DIAZ, being duly sworn, deposes and says that on the 1st day of December, 1975, he served the within Notice of Motion and Affidavit by leaving a copy at the offices of Thomas J. Cahill, United States Attorney for the Southern District of New York, 1 St. Andrew's Plaza, New York, New York with the person apparently in charge of receiving legal papers.


Orlando Diaz

Sworn to before me, the
1st day of December, 1975



MARGARET L. EISMAN
Notary Public, State of New York
No. 0000000000
Qualified in West County
Commission Expires March 30, 1977

NOTICE OF ENTRY

Sir:- Please take notice that the within is a (certified) true copy of a
entered in the office of the clerk of the within
named court on

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:- Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

the day of
M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

Index No.

Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

RUBEN LOPEZ,

Defendant.

NOTICE OF MOTION
AFFIDAVIT

LEWIS R. FRIEDMAN

Attorney for Defendant

Office and Post Office Address, Telephone
Litman, Friedman & Kaufman
120 Broadway, Suite 1118
New York, New York 10005
(212) 349-6750

To

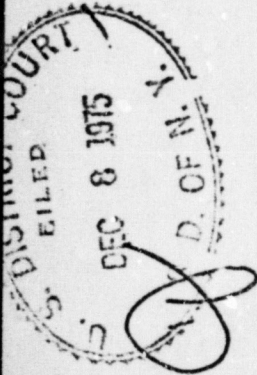
Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for



*Endorsement -
75 Cr. 438 (n.p.)
The motions of
defendant Ruben Lopez
are denied. Suppression
hearing has been held
So Ordered Nelson Becker
12/5/75
usd*

DEC 8 1975

INTELLOJIM

HB:ko

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
:
UNITED STATES OF AMERICA,

-v-

:
:
75 Cr. 938 (M.P.)
:
.

RUBEN LOPEZ,

Defendant.
-----x

GOVERNMENT MEMORANDUM OF LAW
IN OPPOSITION TO MOTIONS BY
COUNSEL FOR LOPEZ

THOMAS J. CAHILL
United States Attorney
for the Southern District
of New York
Attorney for the United States
of America

HARRY C. BATCHELDER, Jr.
Assistant United States Attorney

- Of Counsel -

HB:ko

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA,

-v-

RUBEN LOPEZ,

Defendant.
-----x

:
:
75 Cr. 938 (M.P.)
:
:

GOVERNMENT MEMORANDUM OF LAW
IN OPPOSITION TO MOTIONS BY
COUNSEL FOR LOPEZ

ARGUMENT

POINT I

Counsel for Ruben Lopez moves for a severance of his trial from that of other defendants on various grounds suffice it to say that none of the grounds even approach that considered insufficient by the United States Court of Appeals for the Second Circuit in United States of America v. Finkelstein, et. al., Docket Nos. 75-1154, 1155, 1170, 1171 (Decided December 1, 1975). Lopez's motion for a severances should be denied.

POINT 2

During the events in question the defendant Ruben Lopez was known by the name "John" as such his indictment under that name is not prejudicial but entirely proper.

POINT 3

The Government will consent to a hearing on the issue of whether the statement taken from the defendant Lopez was in violation of his Miranda warnings.

HB:ko

POINT 4

The Government in light of the Supreme Court's holding in Faretta v. California, 43 U.S.L.W. 5004 (June 30, 1975) has no option but to consent to Mr. Lopez acting as his own co-counsel provided he is apprised of the ramifications of his actions.

CONCLUSION

EXCEPT AS CONSENTED TO BY THE GOVERNMENT
DEFENDANT LOPEZ'S MOTIONS SHOULD BE DENIED IN ALL
RESPECTS.

Respectfully submitted,

THOMAS J. CAHILL
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

HARRY C. BATCHELDER, Jr.
Assistant United States Attorney

- Of Counsel -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

RUBEN LOPEZ,

Defendant.

NOTICE OF MOTION

75 Cr. 938 (MP)

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Lewis R. Friedman, sworn to the 10th day of December, 1975, and upon the indictment and all of the prior proceedings had herein, the undersigned will move this Court at a Motion Part thereof to be held before the Honorable Milton Pollack, United States District Judge, at a time and place to be fixed by the Court for an order:

- (1) for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, or, in the alternative
- (2) for a new trial pursuant to Federal Rule of Criminal Procedure 33, or, in the alternative
- (3) for an evidentiary hearing with respect to the motion for a new trial, and

(4) for such other and further relief as the Court
may deem just and proper.

Yours, etc.,

LEWIS R. FRIEDMAN
Attorney for Defendant
Litman, Friedman & Kaufman
120 Broadway, Suite 1118
New York, New York 10005
(212) 349-6750

TO: THOMAS J. CAHILL
United States Attorney
Southern District of New York
1 St. Andrew's Plaza
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

- against -

RUBEN LOPEZ,

Defendant.
-----X

:
:
:
: AFFIDAVIT
:
:

: 75 Cr. 938 (MP)
:
:

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

LEWIS R. FRIEDMAN, being duly sworn, deposes and says:

1. I am the attorney for Ruben Lopez. This affidavit is submitted in support of Lopez's motion for a verdict of acquittal or for a new trial.

2. By a verdict rendered on December 10, 1975, the jury found the defendant Ruben Lopez guilty of conspiracy (count one) and distribution or possession with intent to distribute of cocaine on August 7, 1975 (count five).

The Motion for a Judgment of Acquittal

3. The evidence proven at the trial was a variance to the charge contained in the indictment. The proof at the trial established multiple conspiracies. That proof was not sufficient to convict the defendant of the single conspiracy charged in count one of the indictment.

4. The indictment alleged in count one that it was "part of said conspiracy that the said defendants unlawfully, intentionally, and knowingly would possess and possess with intent to distribute Schedule I narcotic drug controlled substances". There was no proof at the trial that any Schedule I controlled substances were involved in any of the conspiracies described by the evidence. All of the events described transactions in cocaine or cocaine hydrochloride -- a Schedule II narcotic drug controlled substance.

The Motion for a New Trial

5. The court erred in charging the jury and in refusing to charge the jury as requested.

6. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances: The witnesses and the attorney for the Government did not produce in court all of the prior statements made by at least one of the witnesses who testified, Special Agent Bradley.

7. During the course of Agent Bradley's testimony, he was asked on cross-examination by the defendant Lopez what materials he had reviewed prior to his testifying. After making reference to certain handwritten notes and to the

DEA Number 6 forms, which had been marked as Government's exhibits for identification, Agent Bradley testified unequivocally that there were no other notes.

8. During the deliberations of the jury, I was examining certain of the exhibits which had been marked in evidence. As I was looking at those matters, I observed a document upon the table in front of where Special Agent Bradley had been seated during the entire trial, the document, which appeared to be a carbon copy of a typed paper, had what appeared to be question and answer form of testimony relating to Special Agent Bradley's observations. Although I was unable to peruse the document, I observed enough of it to note that the questions on the page that I saw appeared to be the same questions asked by the attorney for the Government on direct examination. After each question appeared an outline of the observations allegedly made by Special Agent Bradley and a notation as to the 3500 Exhibit which contained the information. On the first page of the document I observed was also a bracketed reference which appeared to be a direction to the witness to point out in the courtroom "J.D. No. 1 ... " I was unable to observe more of the document than is described herein, other than to note that in the upper left hand corner

of the page appeared what may well have been the initials of the prosecutor trying the case for the Government.

9. If, as it appears, the document was a prior statement by Special Agent Bradley which he used in the course of his preparation for trial, the answers the Special Agent gave on the stand were false. At the very least, the document would have been withheld from the defense in violation of 18 U.S.C. 3500, and Federal Rule of Evidence 612. Also, the failure of the Government to correct the testimony as given, would constitute a denial of the defendant's rights, particularly if the document was actually one prepared at the request or with the knowledge of the prosecutor.

10. The failure to turn over such a document would be substantially prejudicial to defendant Lopez since a large part of a defense was directed toward the impeachment and discrediting of Special Agent Bradley.

11. At the very least, it would appear that an evidentiary hearing is required to ascertain what the document was, and whether similar documents existed with respect to the other Government agents who testified, specifically, Detective Caracappa.

WHEREFORE defendant Ruben Lopez requests that the
court grant the annexed motion.

Lewis R. Friedman

Sworn to before me this
16th day of December, 1975

NOTICE OF ENTRY

See take notice that the within is a (certified)
 of a
 entered in the office of the Clerk of the within
 court on 19

Yours, etc.,

Office and Post Office Address

may(s) for

NOTICE OF SETTLEMENT

Please take notice that an order

which the within is a true copy will be presented
 to the Hon.

and the judges of the within named Court, at

at day of 19
 M.

Yours, etc.,

may for

Office and Post Office Address

may(s) for

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

RUBEN LOPEZ,

Defendant.

NOTICE OF MOTION
 AFFIDAVIT

LEWIS R. FRIEDMAN
 Attorney for Defendant

Offices and Post Office Address, Telephone
 Litman, Friedman & Kaufman
 120 Broadway, Suite 1118
 New York, New York 10005
 (212) 349-6750

To

Attorney(s) for

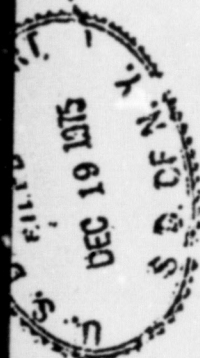
Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

1960-01973 JULIUS SLIMBERS, INC., 80 EXCHANGE PLACE, N. Y. 10004



Motion of Ruben Lopez

75 Cr. 938 (nmp)

*The 3500 materials were
 all turned over to the
 defendant, in advance of
 the testimony of the
 witness [redacted] the motion
 was made. They were
 by the location within [redacted]
 over 3500 materials
 all aspects thereof furnished
 do not constitute [redacted]
 3500 materials and the
 defendant's counsel
 makes a plain argument
 there is no merit to any
 aspect of this motion
 and it is denied in all
 respects.*

*So Ordered Melton [redacted]
 12/18/75 MDS*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

RUBEN LOPEZ and
WALTER SINTSCHA,

Defendants.

75 Cr. 938 (M.P.)

GOVERNMENT'S MEMORANDUM IN
OPPOSITION TO COUNSEL FOR
LOPEZ AND SINTSCHA'S MOTION
TO SET ASIDE VERDICT

FACTS

Counsel for defendants Sintscha and Lopez
have moved by written motion to set aside the verdict
in this matter asserting various grounds which will
be dealt with seriatim.

POINT I.

SINTSCHA'S MOTION TO SET ASIDE
THE VERDICT IS TOTALLY FRIVOLOUS

The evidence adduced at trial established that Walter Sintscha on July 10, 1975, July 23, 1975, July 25, 1975, August 7, 1975 and September 10, 1975, possessed or distributed varying amounts of cocaine. The sole defense at trial was entrapment and the jury was carefully instructed by this court as to the defense and rejected it. If ever there existed a "smoking gun" case this is it and any argument on insufficiency is made for good weight not good measure.

POINT II.

COUNSEL FOR LOPEZ'S CONTENTIONS
AS TO FATAL VARIANCE ARE WITHOUT
MERIT.

Counsel for Lopez has pointed out a typographical error in the indictment which it is claimed mandates reversal. Suffice it to say no citation is given for this proposition as under F.R.C.P. Rule 7 none exists. The substantive counts all refer to cocaine as a Schedule II drug and Lopez was convicted in Count Five of distributing that substance as well

as conspiracy. The Government turned its complete file over to counsel before the trial and counsel was presumably fully aware of the defect prior to trial/^{as}to the stuatuory miscitation. No prejudice has been alleged and Lopez could not under any conceivable stretch of the imagination have been prejudiced. Indeed, astute counsel by waiting until this late occasion has simply waived any such defect. See, e.g., Call v. United States, 265 F.2d 167, 170(4th Cir. 1959), cert. denied, 361 U.S. 815 (1959); United States v. Calabro, 467 F.2d 973 (2d Cir.) cert. denied, 410 U.S. 926 (1973); Theriault v. United States, 434 F.2d 212, 213 (5th Cir. 1970), cert. denied, 411 U.S. 984 (1970).

POINT III.

COUNSEL'S INTIMATION THAT AN
ASSISTANT UNITED STATES ATTOR-
NEY SUPPRESSED 3500 MATERIAL
IS WITHOUT FOUNDATION.

According to defense counsel, while rummaging around the prosecutor's table, he by chance, spied the traditional prosecutor's witness outline which is used by all assistants. I prepared this outline without agent Bradely's assistance and reviewed the contents as an aid in preparing my

summation. These documents are still in existence and I will produce them for the Court's review if it so requires. Traditionally such documents are not 3500 material even though a witness may have read them to refresh his recollection. United States v. Myerson, 368 F.2d 393 (2d Cir. 1966) (per curiam), cert. denied, 386 U.S. 991 (1967).

POINT IV.

LOPEZ'S CONTENTIONS WITH RESPECT
TO MULTIPLE CONSPIRACIES IS
WITHOUT MERIT

This court is fully familiar with the Miley decision and its progeny. Suffice it to say that in this case three of the defendants were intimately known to each other in that they were roommates. Walter Sintscha, as the moving force, conspired with both Padron and Lopez to distribute narcotics. Indeed, Lopez, although acquitted on the substantive count, bragged he had acted as Sintscha's courier on the transaction just prior to the one involving Padron. In a devastating tape Sintscha stated he was no longer dealing with his connection in Queens and would deal with [John] i.e. Lopez. A portion of the negotiations by Lopez and Sintscha with Detective Caracappa contained references to various other sources of supply i.e. Queens. Lopez could only be deaf and dumb not to have understood the ramifications of the conspiracy

and its broad outline. Lopez is far from deaf and dumb as the trial record indicates.

POINT V.

COUNSEL FOR LOPEZ'S OTHER
MISCELLANY OF IMAGINED ERRORS
DOES NOT REQUIRE COMMENT

Respectfully submitted,

THOMAS J. CAHILL
United States Attorney for the
Southern District of New York
Attorney for the United States
of America .

HARRY C. BATCHELDER, JR.
Assistant United States Attorney

Of Counsel.

COPY RECEIVED

APR 21 1976

ROBERT B. FISKE JR.

ATTORNEY
SO. DIST. OF N. Y.

Copy received
The Legal Aid Society
Federal Appeals
4/21/76